Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-798

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COALITION FOR CLEAN AIR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:	Page
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Japan Whaling Ass'n v. *American Cetacean Soc'y*, 478 U.S. 221 (1986)	9-10
Pauley v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991)	10
Statutes:	
Clean Air Act, 42 U.S.C. 7401 *et seq.*:	
§ 110(a)(2), 42 U.S.C. 7410(a)(2)(A)	2
§ 110(c), 42 U.S.C. 7410(c) (Supp. II 1990)	2, 3
§ 110(c)(1), 42 U.S.C. 7410(c)(1) (Supp. II 1990)	2
§ 110(k)(1), 42 U.S.C. 7410(k)(1) (Supp. II 1990)	3
§ 110(k)(2), 42 U.S.C. 7410(k)(2)	3
§ 182(c)(2), 42 U.S.C. 7511a(c)(2) (Supp. II 1990)	2
§ 182(e), 42 U.S.C. 7511a(e) (Supp. II 1990)	2, 5
§ 182(e)(5), 42 U.S.C. 7511a(e)(5) (Supp. II 1990)	5-6
§ 193, 42 U.S.C. 7515 (Supp. II 1990)	8
§ 209(e)(1), 42 U.S.C. 7543(e)(1) (Supp. II 1990)	7
§ 213, 42 U.S.C. 7547	7
§ 213(a)(3), 42 U.S.C. 7547(a)(3) (Supp. II 1990)	8
§ 213(a)(5), 42 U.S.C. 7547(a)(5) (Supp. II 1990)	8
§§ 231-234, 42 U.S.C. 7571-7574	8
§ 233, 42 U.S.C. 7573	8
§ 302(y), 42 U.S.C. 7602(y) (Supp. II 1990)	7
Miscellaneous:	
136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990)	9
55 Fed. Reg. (1990):	
p. 36,460	5
p. 36,462	4
pp. 36,462-36,463	5

Miscellaneous—Continued: Page

p. 36,466 4
p. 36,472 3
p. 36,479-36,484 4
p. 36,503 6
Letter from James D. Boyd, Executive Officer, California Air Resources Board to EPA Regional Administrator Daniel McGovern (Nov. 30, 1990) 5
Letter from Norton Younglove, Chairman, SCAQMD Board to EPA Regional Administrator Daniel McGovern (Oct. 5, 1990) 5

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As demonstrated in the petition (Pet. 13-22), the court of appeals effectively nullified Congress's decision, expressed in the 1990 Amendments to the Clean Air Act, to give California the initial responsibility for developing the governmental response to the severe problems of air pollution in the Los Angeles area. Respondents fail to provide any convincing rationale to justify that judicial overruling of Congress's specifically focused determination. See Point 2, *infra*. Instead, implicitly recognizing the weakness of the court of appeals' ruling on the merits, respondents principally attempt to minimize the practical consequences of the decision below. In fact, however (see Point 1, *infra*), there is no assurance that respondents' optimistic and ultimately speculative predictions will prove correct—even if those predictions would otherwise justify the court of appeals' remarkable departure from the statutory scheme.

1. Respondents seek to minimize the impact of an immediate EPA federal implementation plan (FIP) for

ozone by downplaying the burdens that it could impose and by overstating the current availability of approvable state control measures to relieve EPA of its FIP burden. See Coalition for Clean Air, et al. (CCA) Br. in Opp. 9-17; South Coast Air Quality Management District (SCAQMD) Br. in Opp. 9-17. In fact, however, respondents' legal position in this case would either force EPA to produce an ozone FIP for the South Coast in the absence of the very state measures that respondents assert the FIP can complement, or compel the relevant state authorities to accelerate their planning efforts beyond the pace dictated by the 1990 Amendments. That is so because Section 110(c) requires the preparation of a FIP unless "the State corrects the deficiency and the Administrator approves the plan or plan revision" before issuing a FIP. 42 U.S.C. 7410(c)(1) (Supp. II 1990). In order for EPA's Administrator to approve a state plan, it must be "submitted" by the State for approval, *ibid.*, and it must include "enforceable emission limitations and other control measures." 42 U.S.C. 7410(a)(2)(A) (Supp. II 1990).

a. As a result of these provisions, if EPA has an obligation to prepare a FIP now for ozone attainment, it cannot rely on current state and local planning efforts to relieve it of that obligation unless and until California submits an ozone SIP revision to EPA and the agency approves it prior to the promulgation of the final FIP. Under the 1990 Amendments, the time for submission of the SIP revisions for ozone attainment in the Los Angeles area is November 15, 1994. 42 U.S.C. 7511a(c)(2) and (e) (Supp. II 1990). Accordingly, California would be denied much of the planning time afforded by the 1990 Amendments if it were to submit a revised SIP in time to fill any portion of the "gap" ordered to be filled by EPA in this case.[1]

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[1] California recently submitted its revised carbon-monoxide SIP under the 1990 Amendments. EPA has just begun its review of that

In California, the state agency that adopts and submits SIP revisions to EPA for approval is the California Air Resources Board (CARB). In 1991, respondent SCAQMD adopted a plan revision addressing ozone, but that 1991 plan has not yet been adopted by CARB for submission as a SIP revision. Indeed, the CARB staff has determined that the 1991 plan would be inadequate as a SIP because "[m]ost of the plan elements * * * are incomplete" and are "unlikely to be approved by EPA." CARB staff report, Sept. 16, 1992, at 34.[2] Moreover, the 1991 plan is the subject of a state court challenge filed by one of the respondents in this case. *Coalition for Clean Air* v. *California Air Resources Board*, No. 372697 (Cal. Super. Ct., Sacramento County, filed Nov. 19, 1992). Accordingly, it is at best speculative that an approvable SIP submittal will be forthcoming to foreclose the adoption of a fully independent FIP.[3]

In its 1990 proposed FIP for the South Coast, EPA considered a 1989 SIP submission based, in part, on a 1989 plan prepared by SCAQMD.[4] That 1989 SCAQMD plan

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plan, however, so it is unclear whether it satisfies the requirements of the Act.

[2] EPA staff informs us that CARB staff has suggested, in informal discussions, that, as a last resort, it would be inclined to recommend that CARB submit portions of the concededly inadequate 1991 plan as a SIP if EPA ultimately must promulgate a FIP. In light of CARB staff's own assessment of the current plan, the prospect that such a submission would obviate the need for a FIP is remote.

[3] The Clean Air Act, moreover, affords EPA 60 days after a plan submission to determine whether such a submission meets minimum criteria and a further 12 months after that deadline to determine whether such a submission should be approved. 42 U.S.C. 7410(k)(1) and (2). In order to forestall the obligation to adopt a FIP, the SIP revision must not only be submitted, but must be approved by the Administrator. 42 U.S.C. 7410(c) (Supp. II 1990).

[4] The 1989 SIP submission was also based in part on the revised version of the California motor vehicle program adopted by CARB. See 55 Fed. Reg. 36,472 (1990). EPA was willing to credit the South Coast for emission reductions projected by this program under the expectation that the revised program itself would be submitted as a SIP revision.

contained relatively few immediately enforceable emissions limitations and consisted largely of a schedule upon which additional emissions limitations on various categories of sources would be adopted by state and local agencies in the future. See 55 Fed. Reg. at 36,479-36,484. EPA proposed to approve limited portions of the SIP submission but proposed to reject the central showing of reasonable further progress and the attainment-demonstration portion of the 1989 SIP "because the measures in the revised SIP do not provide sufficient emissions reductions in an enforceable form." *Id.* at 36,466. Respondents' reliance on the 1989 SIP (CCA Br. in Opp. 12; SCAQMD Br. in Opp. 11) is therefore misplaced, because the 1989 SIP was inadequate when it was submitted and it appears that the 1989 SCAQMD plan has been superseded by the 1991 SCAQMD plan.

In short, California's plans to address attainment of the Act's ozone standards in the South Coast are currently in an uncertain state. Respondents' assurance that EPA's FIP "can be limited in scope to what is necessary to support state efforts" (SCAQMD Br. in Opp. 10; CCA Br. in Opp. 17), thus ignores the central fact that those "state efforts" have not matured into a SIP submittal that EPA could approve as a mechanism for lessening the "gap" to be filled by a FIP.

b. Respondents next argue (CCA Br. in Opp. 14-16; SCAQMD Br. in Opp. 7, 14-15) that an EPA FIP would not necessarily include harsh measures, and point to EPA's 1990 FIP proposal as evidence for that proposition. In fact, however, the "backstop" regulatory measures proposed as an alternative in the 1990 proposed FIP were viewed as draconian by commentators. The 1990 proposal anticipated that near-term reductions in ozone precursors could be achieved through a combination of state-proposed

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Ibid. Most of that program has never been formally submitted by the State for approval as part of the SIP.

measures and federal reformulated-fuels and other measures (55 Fed. Reg. at 36,462), but called for across-the-board reductions in emissions from all stationary and other sources in the area as one alternative means of attaining the necessary emissions reductions in later years. *Id.* at 36,462-36,463. Those proposed reductions were deemed "technologically infeasible" and "inequitable" by SCAQMD in 1990. Letter from Norton Younglove, Chairman, SCAQMD Board to EPA Regional Administrator Daniel McGovern at 1-2 (Oct. 5, 1990). Similarly, CARB predicted that "adverse effects would happen even if the measures are adopted but never implemented," because businesses would realize that they would not be able to comply and would "leave the basin in advance of implementation." Letter from James D. Boyd, Executive Officer, California Air Resources Board to EPA Regional Administrator Daniel McGovern at 6-7.

Respondent CCA argues (Br. in Opp. 16) that stringent regulatory FIP measures are a speculative threat, and that whether to impose them is a matter of EPA choice. EPA struggled in its 1990 proposal to avoid such measures, and would no doubt continue such efforts to mitigate the harsh impacts of a FIP if it were required to issue one here. The inescapable reality, however, is that the emissions reductions required to close the "gap" in the current plans amount to more than 80% of the ozone precursors in the air basin. 55 Fed. Reg. at 36,460. The techniques or measures that are both available to EPA and capable of independent federal enforcement to meet these demands are strictly limited. As a result, EPA will, in all probability, be required to propose extraordinarily stringent measures if it is to prepare a comprehensive ozone FIP independent of further state plans approvable as a SIP.[5]

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[5] Respondent SCAQMD argues (SCAQMD Br. in Opp. 13) that EPA can avail itself of the authority under new Section 182(e)(5), 42 U.S.C. 7511a(e)(5) (Supp. II 1990), to lessen the burden of a FIP. That Section

Respondent CCA contends (Br. in Opp. 14-16) that there are financial costs associated with *any* plan to improve air quality, state or federal, and that the social and economic burdens of a FIP will be no greater than those ultimately required under a SIP. In fact, however, the limited techniques available to the federal government, in comparison to those available to the state and local governments, dictate that emission reductions mandated by a fully independent FIP would be likely to impose greater burdens on the economic and social life of the community. Pet. 22-23; Los Angeles Chamber of Commerce Amicus Br. Curiae 5-7. Moreover, respondent's argument fails to account for the incremental costs that would result from duplication of compliance efforts by affected sources if the State fails to submit a SIP revision that can be approved by EPA prior to promulgation of a FIP. As sources attempt to make the long-term capital investments necessary to meet their compliance obligations, they will be faced with questions concerning *which* plan—state or federal—will ultimately be controlling. To the extent that affected sources are subject to different control requirements by different governmental entities, pollution control requirements necessarily become even more onerous.

2. a. As we explain in the petition (Pet. 16-17), the court of appeals' interpretation of the Clean Air Act is illogical. FIPs are defined as federal plans designed to remedy gaps

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authorizes EPA to approve certain South Coast ozone SIP submissions that anticipate development of new or improved control technologies. SCAQMD's reliance on Section 182(e)(5) ignores the fact that the State has not yet submitted any South Coast ozone plan to EPA for approval under the 1990 Amendments.

Respondents also suggest (SCAQMD Br. in Opp. 12) that EPA could issue a FIP composed of EPA commitments to develop and adopt at a later date measures to achieve emissions reductions. EPA proposed such a "committal" FIP as an alternative in its 1990 FIP proposal, but noted that "it is unclear whether a committal FIP for the [South Coast] would be consistent with the statute." 55 Fed. Reg. at 36,503. The 1990 Amendments did not eliminate that uncertainty.

or "inadequac[ies]" in SIPs. 42 U.S.C. 7602(y) (Supp. II 1990). The "inadequacy" that gave rise to the FIP obligation in this case was the State's failure to meet pre-1990 deadlines that were repealed by the 1990 Amendments. Thus, the court of appeals in effect read the Act to require issuance of a FIP to remedy an "inadequacy" that no longer exists.

Respondent CCA claims that the "lack of sufficient measures [in the pre-1990 South Coast SIP] to attain NAAQS by *any* date, including the new statutory deadlines, is the 'gap' that EPA must now fill." CCA Br. in Opp. 11 n.11. But it is illogical to say that the old SIP was declared deficient in 1988 because it did not demonstrate compliance with deadlines that were not imposed until 1990.[6] The "gap" that occasioned EPA's 1988 disapproval plainly related to the old law, not the new.

Respondent SCAQMD suggests (Br. in Opp. 16-17) that its inability under the Act to address certain mobile sources of pollution—new construction and farm equipment, aircraft, and new locomotives—creates a gap as to those sources, and recommends that EPA fill that gap in a FIP. That argument disregards the new statutory scheme. The 1990 Amendments established specific schedules and conditions under which EPA is to regulate most of those classes of mobile sources pursuant to Title II of the Act.[7] Those provisions are wholly separate from,

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[6] Even the court of appeals did not endorse this reading of the Act. To the contrary, the court expressly declined to "decide whether EPA would be required to meet any additional requirements imposed by the 1990 Amendments in promulgating FIPs for the South Coast." Pet. App. 13a.

[7] Section 209(e)(1) preempts the States from regulating new locomotives, new locomotive engines, and new farm and construction equipment with engines of less than 175 horsepower. 42 U.S.C. 7543(e)(1) (Supp. II 1990). Section 213 in turn requires EPA to issue national standards for new locomotives and locomotive engines by 1995, and requires EPA to issue standards for other nonroad engines by

and independent of, the Title I SIP and FIP provisions at issue in this case. Thus, the statutory scheme provides no support for SCAQMD's suggestion that EPA must address those sources immediately by promulgating a FIP.

b. Respondents contend (CCA Br. in Opp. 28; SCAQMD Br. in Opp. 20-22) that the second sentence of the 1990 Amendments' savings clause, which precludes modification of any "control requirement * * * required to be adopted by an order [or] settlement agreement," preserves EPA's FIP obligation in this case. 42 U.S.C. 7515 (Supp. II 1990). For the reasons set forth in the petition (Pet. 17-18), that contention is without merit, because the obligation to promulgate a FIP is not itself a "control requirement" subject to the savings clause. See also Pet. App. 39a-40a. Even if there were some doubt about the meaning of the term "control requirement," EPA's reasonable interpretation of that term as encompassing only specific emissions-control measures would be entitled to deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

Moreover, the savings clause preserves preexisting orders that require the adoption of control measures only "to the extent" that they are not "inconsistent with any provision of this [Act]." 42 U.S.C. 7515 (Supp. II 1990). The 1990 Amendments repealed the deadlines on which EPA's 1988 disapproval of the South Coast SIP submittal had been based, and substituted new ozone-SIP requirements that the State has not yet attempted to meet by submitting a revised ozone SIP. Thus, EPA's 1988

November 1992 if certain findings are made. 42 U.S.C. 7547(a)(3) and (5) (Supp. II 1990).

Title II also establishes EPA's authority, in conjunction with the Department of Transportation, to regulate emissions from aircraft. 42 U.S.C. 7571-7574. The States are preempted from imposing more stringent standards "respecting emissions of any air pollutant from any aircraft or engine," 42 U.S.C. 7573, but the Act does not prevent the States from reducing aircraft emissions in other ways.

disapproval of the South Coast SIP is "inconsistent with" the new SIP provisions of the 1990 Amendments, and does not survive by reason of the savings clause.

c. Respondents err in contending (CCA Br. in Opp. 6-7, 22-23; SCAQMD Br. in Opp. 8, 23-24) that the legislative history of the 1990 Amendments supports their interpretation of the Act. Respondents rely on Senator Baucus's statement that "EPA should complete ongoing FIP processes only for the purposes of ensuring that the standards are met by the statutory deadlines." CCA Br. in Opp. 7 (quoting 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990)); SCAQMD Br. in Opp. 23. Respondents read this statement to mean that EPA must promulgate a FIP now, but fail to explain how that interpretation can be reconciled with Senator Baucus's contemporaneous statement that "[w]e do not intend that this savings clause requires EPA to finalize the Federal Implementation Plan in California." 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990); see Pet. 21. Read together, the Senator's two statements show that he believed that the 1990 Amendments suspended EPA's pre-1990 FIP obligation, but that EPA will need to promulgate a FIP demonstrating attainment if California ultimately fails to meet its SIP obligations under the 1990 Amendments.[8]

d. Finally, respondent CCA's contention that *Chevron* does not apply here (CCA Br. in Opp. 26-27) is incorrect. CCA errs in suggesting that *Chevron* deference has never been applied in a mandatory duty context. See *Japan Whaling Ass'n* v. *American Cetacean Soc'y.*, 478 U.S. 221,

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[8] Respondents also rely in part on floor statements to the effect that "EPA has the obligation to adopt control measures for sources which it exclusively controls when those controls are necessary to help attain national standards or meet other requirements of the Act." 136 Cong. Rec. S16,970 (daily ed. Oct. 27, 1990). Those statements, however, refer to the mobile sources of pollution (*i.e.*, non-road engines, locomotives, and aircraft) that EPA alone can address under its authority in Title II of the Act, and shed no light whatsoever on the question whether EPA must promulgate a FIP under Title I of the Act.

231-235 (1986) (Court deferred to agency's reasonable determination of circumstances under which mandatory statutory duty arose). Nor is it necessary for Congress to provide an express delegation to the agency, as respondents imply (CCA Br. in Opp. 27). See *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (Congress may delegate interpretive authority to an agency either "through express delegation or the introduction of an interpretive gap in the statutory structure").[9]

The relevant provisions of the amended Act either clearly dispense with the old-law FIP obligation, or can reasonably be interpreted in that way. As a result, under either prong of the analysis mandated in *Chevron*, the court of appeals' decision to the contrary is erroneous.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1992

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[9] Respondents also rely (CCA Br. in Opp. 4-5, 22-23) on the letter written by EPA Administrator Reilly to Congress some six months before enactment of the 1990 Amendments, but EPA's post-enactment interpretation of the Act should be regarded as the agency's authoritative interpretation. See Pet. 20-21. EPA cited that interpretation in a supplemental brief filed on April 3, 1992. Thus, at the time of its decision on the merits, the Ninth Circuit had before it EPA's contemporaneous construction of the statute.